IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT GUERRINA	)	SUPREME COURT NO. 71444
	)	
Appellant,	)	
	)	
vs.	)	**APPEAL**
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	DISTRICT COURT NO. C-308561
	)	
	)	

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

GUERRINA offers the following by way of reply to the State's Answering Brief filed on August 14, 2017.

I

FACTUAL DISCREPANCIES

The following assertions made by the state are not supported by the portions of the record cited by the state or any other portions which GUERRINA is able to locate.

> **At a hearing on July 14, 2016 (11 days before trial was scheduled to begin), Appellant told the district court that, if the motion were granted, he would need an unspecified extra amount of time to prepare for trial. 2 AA 239, 240. The district court denied the motion. 2 AA 241.[1]**

These statements are misleading and mis-cited. First of all, GUERRINA filed his motion a full 31 days before trial commenced. The motion was filed on July 1, 2016,[2] and trial commenced on August 1, 2016.[3] GUERRINA did advise the court on July 14, 2016 that if his motion to represent himself was granted that he would need a continuance because he still did not have all of his discovery.[4] GUERRINA asserted that research had not been done, discovery had not been done, witnesses had not been interviewed, and that he had received a list of

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1 Ans.Brf./2-3.
2 GA/1/204.
3 GA/2/262.
4 GA/2/232.

witnesses only three days prior which he felt was incomplete.[5] The Court never inquired as to how much time he would need to prepare, so it didn't know if he needed a few days, a week, or a few weeks.[6]

> **As she walked to the front door to unlock it, the man walked up to her carrying what looked like a switchblade knife. 3 AA 607-08.[7]**

Nowhere on the cited pages did Cuevas testify that the man she saw *in the reflection of the glass* was carrying anything in his hand, much less a knife of any kind. She DID testify at AA/3/610 that when the man came up to her she saw a folding knife that was closed. She never saw a blade. So, there was never any evidence that the man was carrying a deadly weapon.[8] All she saw was a white handle of some object which she believed was a knife, but she never saw a knife blade.[9]

> **When the man approached her outside the building, Ana recognized him as Appellant, a former manager at the same store. 3 AA 614, 638-39; 4 AA 672.[10]**

Cuevas actually testified that she had seen a man that she thought was her assailant *in passing* two to three times previously – once at a job site, once when she was changing shifts taking over for him at his store, and a third time at a

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5 GA/2/238.
6 GA/2/237.
7 Ans.Brf./4.
8 GA/3/610.
9 GA/3/611.
10 Ans.Brf./4.

manager's meeting where all FastBuck managers were present.[11] She believed that the last time she saw the man was more than six months prior to the robbery.[12] She did not recall ever speaking with him prior to the date of the robbery.[13] At no time did Cuevas testify that her assailant had ever been a manager at the store that was robbed. This is important to the kidnapping conviction because the state is claiming that the assailant making Cuevas go into the store to get the money was not incident to the robbery because the assailant having been a manager *at that store* knew where the money was kept. That is not true.

> **Money from the previous day was kept in the store overnight and deposited in the bank in the morning because, by the time the store closed, the bank was no longer open. The Monday morning deposit tended to be the largest of the week because it included money collected on both Friday and Saturday.[14]**

This statement was added as a footnote with no cite to the record. Therefore, it should be disregarded. It implies that the robber had knowledge of the store policies (former manager) and robbed it on a Monday because he knew the money on hand would be larger on that day.

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11 GA/3/638.
12 GA/3/642.
13 GA/3/643.
14 Ans.Brf./4, fn 1.

II

ARGUMENT ISSUES

A. GUERRINA DENIED RIGHT TO REPRESENT HIMSELF

The court denied GUERRINA's motion to represent himself because it stated that he was currently with his second appointed lawyer and it was "not gonna get into the business of appointing lawyer, after lawyer, after lawyer…"[15] However, GUERRINA was not asking for another lawyer to be appointed. He was asking to represent himself because the two lawyers appointed to represent him had not done their job. Asking to represent oneself is a much different thing than asking for another attorney to be appointed. His counsel had not investigated his case. They had not interviewed witnesses so they had no idea how to cross-examine the state's witnesses. They had not listed witnesses who would be beneficial to GUERRINA. They had not even obtained all the discovery. The state argues that because these things had not been done, a trial continuance would be required, and that somehow that was a reason to deny the motion to self represent.[16] That these things had not been done is the travesty, and the trial court should have been sympathetic to GUERRINA's plight and the fact that appointed counsel were not doing their jobs.

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15 Ans.Brf./9.

16 Ans.Brf./12.

As the United States Supreme Court stated in *Faretta*:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused ***personally*** the right to make his defense. ***It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'*** Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.[17] (emphasis added)

The state argues that GUERRINA's position is that the Ninth Circuit Court of Appeals held in *Marshall v. Taylor*,[18] that a request for self-representation must be granted if made more than one week before trial.[19] GUERRINA made no such argument. GUERRINA's position is that a request made weeks before trial based on reasonable grounds must be granted. In *Marshall*, as in *Lyons* the request was made the day of trial. And, in *Marshall*, no reasonable grounds for not making the request earlier were given. The situation is different here. GUERRINA had tried on two separate occasions to obtain competent representation. He had asked to have his first attorney replaced because he was not adequately representing him, and when his second attorney likewise dropped the ball, he asked to represent himself. Both of his court-appointed attorneys had asked for continuances because

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17 *Faretta v. California*, 422 U.S. 806, 819–20 (1975).
18 *Marshall v. Taylor,* 395 F.3d 1058 (9th Cir. 2005).
19 Ans.Brf./11.

they were not prepared for trial. That was not GUERRINA's fault.

Yet, despite all these continuances to accommodate his court-appointed counsel's caseload, by one month before trial, GUERRINA had still not received all the discovery, and that is when he realized he was probably not going to get that information before trial. As it was, he did not know until three days before he brought the motion to represent himself that the witness list was deficient. As stated in his Opening Brief, GUERRINA's attorney was out of the country the entire week before trial was to commence, and was not even due to return by the scheduled trial date.[20]

It simply cannot be concluded that an indigent criminal defendant who is repeatedly given inadequate counsel by the state, who repeatedly tries to communicate with his attorneys and is repeatedly ignored, may be precluded from representing himself when he makes such a request four weeks prior to start of trial. If the trial had to be continued a few weeks, so be it. We are here talking about years of a man's life in prison.

B. KIDNAPING COUNT NOT SUPPORTED BY THE EVIDENCE

The state argues that forcing CUEVAS inside the store and making her get the money was not incident to the robbery because it increased the risk of harm to her. It argues that the assailant could have simply taken the keys and unlocked the

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[20] GA/2/251, 254-259.

door himself, and that since he was a former manager, he knew where the money was.[21] First, if he had simply taken the keys and left CUEVAS to her own devices, he would not have been able to complete the robbery because she would have been free to summon the police. Second, there was no evidence that the assailant knew where the money was kept ***at that*** location. GUERRINA had worked at other locations, but never at the one that was robbed. So, even assuming that GUERRINA was the assailant, he needed CUEVAS to go inside the store to get the money for him. He went inside the door of the store, and never left that location. He did not move her from place to place. He did not threaten her with anything at any time.

Once the assailant left the store and locked the door, CUEVAS could have escaped through large windows in the back of the store, even if she had to move a couple of boxes and break a window. She had a phone to call for help. So, she was never in danger simply by being inside the store with the front door locked.

C. NO DEADLY WEAPON

First the state makes much of GUERRINA's cite to an unpublished decision and cites to *MB America*[22] for the proposition that such citation is not persuasive because the unpublished decision was rendered prior to 2016 when the rules

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21 Ans.Brf./16.

22 *MB America, Inc. v. Alaska Pac. Leasing,* 367 P.3d 1286 (Nev. 2016).

changed allowing citation to such decisions. GUERRINA at no time attempted to mislead this Court. It clearly stated that the citation was to an unpublished decision.[23] While the citation may not be persuasive, GUERRINA would note that this Court nevertheless **considered** a similar unpublished citation in *MB America*, and **distinguished it** as not controlling because it involved arbitration, as opposed to mediation, which was at issue in *MB America.* GUERRINA feels he would be remiss in not at least directing this Court to a case that is on point. It is of course up to this Court whether to disregard it or not.

The state argues that CUEVAS actually saw a switchblade knife in the assailant's hand. It cites to 3 AA 607-08 for that proposition.[24] Nowhere on those pages, does CUEVAS ever testify that she saw a knife in the assailant's hand. In fact, CUEVAS admitted that she was not sure that the assailant was carrying a knife at all.[25] There was absolutely no evidence to support the deadly weapon enhancement, and it should be reversed.

D. NO COERCION

The state argues that CUEVAS was afraid because the assailant had directed her to throw the telephone on the floor.[26] However the telephone still worked, and

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23 Op.Brf./16.
24 Ans.Brf./20.
25 GA/4/650.
26 Ans.Brf./22.

is the phone she used to call the police. In addition, there was another phone in the rear of the store. So, CUEVAS' "fear" over that act was unfounded.

Additionally, the state argues that because CUEVAS was afraid of the liquid that the assailant poured on the floor, that constituted coercion.[27]

However, whether she was afraid of the liquid or the phone being thrown on the ground, fear is not an element of coercion. As noted by the state, coercion required violence or injury.[28] Neither of those occurred in this case, and the coercion count must be reversed.

E. EXCULPATORY EVIDENCE NOT PRESERVED

The Court completely disregarded the alibi nature of the video which the state failed to preserve. It would have shown that GUERRINA left the Motel 6 after the robbery and therefore could not have committed the theft, since he was inside the Motel 6 at the time the robbery was taking place. However, the trial court concluded that since CUEVAS positively identified GUERRINA as her assailant, the video was irrelevant.[29]

The point here is that CUEVAS was wrong. She had to be wrong because GUERRINA did not commit this crime. Moreover, it makes no sense that the police would not save the video if it had been beneficial to the state's case. It is

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27 Ans.Brf./21.
28 Ans.Brf./21.
29 GA/3/637.

reasonable to assume that it was beneficial to the defense and that is why it was not preserved, showing extreme bad faith on the part of the state.

III

CONCLUSION

GUERRINA's convictions should be reversed and the matter remanded for a new trial because (1) he was improperly denied the right to represent himself at trial, (2) the kidnaping conviction was not supported by the evidence because any movement of CUEVAS was incident to the robbery, (3) there was no evidence that the assailant had a deadly weapon, (4) the elements for coercion were not proven, and (5) alibi evidence was not preserved by the police who were acting in bad faith in not preserving it.

Respectfully submitted,

Dated this 25th day of September, 2017.

/s/ Sandra L. Stewart
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Attorney for Appellant

IV

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this reply brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it contains only 2,631 words.

DATED: September 25, 2017

/s/ Sandra L. Stewart
SANDRA L. STEWART, Esq.
Appellate Counsel for
ROBERT GUERRINA

V

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

APPELLANT'S REPLY BRIEF

by mailing a copy on September 26, 2017 via first class mail, postage thereon fully prepaid, to the following:

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and by e-filing the original with the Nevada Supreme Court, thereby providing a copy to the following:

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/s/ Sandra L. Stewart
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